

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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H. C. ANDERSON,

*Appellant,*

vs.

O. H. AVEY AND PAYETTE VAL-  
LEY LAND AND ORCHARD COM-  
PANY, LIMITED, a Corporation,

*Appellee.*

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**Transcript of Record**

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*Upon Appeal From the United States District Court  
for the District of Idaho, Southern Division.*

FILED  
DEC 27 1923

F. O. MONTGOMERY



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**United States Circuit Court of Appeals**  
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LEY LAND AND ORCHARD COM-  
PANY, LIMITED, a Corporation,

*Appellee.*

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**Transcript of Record**

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*Upon Appeal From the United States District Court  
for the District of Idaho, Southern Division.*

NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD:

---

HAWLEY & HAWLEY,  
Boise, Idaho.

JOHN H. NORRIS,  
Payette, Idaho.  
*Attorneys for Appellants.*

RICHARDS & HAGA,  
Boise, Idaho.

THOMPSON & BICKNELL,  
Caldwell, Idaho.  
*Attorneys for Appellees.*

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*In the District Court of the United States for the  
District of Idaho, Southern Division.*

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H. C. ANDERSON,

*Plaintiff,*

vs.

O. H. AVEY and PAYETTE  
VALLEY LAND AND OR-  
CHARD COMPANY, LIM-  
ITED, a Corporation,

*Defendants.*

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In Equity 644.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That in the foregoing cause the following proceedings were had, to-wit:

1. The complaint of plaintiff was filed with the Clerk of said Court in the following words, omitting the title of court and cause which is identical with the title of this bill of exceptions:

“COMES NOW, The complainant herein, and complaining of defendants herein alleges:

I.

That the complainant herein is now and at all the times herein mentioned was, a citizen and resident of the State of Oregon.

## II.

That the complainant herein is now and at all times when the acts herein complained of were committed was, a stockholder in the defendant Payette Valley Land and Orchard Company, a corporation.

## III.

That defendant O. H. Avey is now and at all the times herein mentioned was a citizen and resident of the State of Idaho, residing at Payette in said State of Idaho.

## VI.

That the defendant Payette Valley Land and Orchard Company, Limited, is a corporation organized and existing under and by virtue of the laws of the State of Idaho, with its principal place of business at Payette in Payette County, (formerly a part of Canyon County), Idaho. That said corporation was organized on or about the 19th day of April, 1910. That the articles of incorporation authorize the issuance of capital stock in the amount of 2,500 shares of the par value of \$100.00 per share. That said defendant is a citizen of the State of Idaho.

## V.

That said corporation was authorized by its articles of incorporation, to purchase, acquire, hold, lease, manage, control, maintain and operate and build reservoir sites, dam sites, water, water rights,



flumes, towers, and canals, buildings and machinery for supplying, selling and distributing water and electric power and to buy, sell, hold, mortgage, and lease real estate.

## VI.

That Defendant O. H. Avey is now and at all times since the organization of said corporation has been, a member of the Board of Directors of and President of said defendant, Payette Valley Land and Orchard Company, a corporation.

## VII.

That the plaintiff is now and for a long time prior hereto has been, the owner and record holder of 304 shares of stock in defendant corporation. That the defendant O. H. Avey is now owner and record holder of 215 shares of stock in defendant corporation and has been such owner and holder for a long time prior hereto. That one R. E. Haynes for a long time prior hereto has been and still is the owner and record holder of 60 shares of stock of said defendant corporation. That one L. V. Patch, now is and for a long time prior hereto has been the owner and record holder of 106 shares of the stock in defendant corporation. That one M. F. Albert is now and for a long time prior hereto has been the owner and record holder of 215 shares in the said defendant corporation. That one A. P. Scritchfield now is and for a long time prior hereto has been the owner and record holder of 208

shares in defendant corporation. That one C. E. Larson, now is and for a long time prior hereto has been, the owner and record holder of 104 shares of stock in said defendant corporation. That 1,428 shares of stock in said defendant corporation have been issued. That said defendant O. H. Avey and said R. E. Haynes, M. F. Albert, A. P. Scritchfield, L. V. Patch and C. E. Larson, are the duly elected and acting directors of said corporation, and together as above set forth are the record holders of 912 of said issued shares, being a majority of all shares of stock issued.

#### VIII.

That the by-laws of said defendant corporation provide, among other things, that it shall be the duty of the board of directors to cause to be issued to the stockholders in proportion to their several interests, certificates of stock not to exceed in the aggregate the capital stock of the company.

That on or about the 21st day of February, 1910, and in violation of said by-laws, 100 shares of stock in said defendant corporation of the par value of \$100.00 per share were issued by order of the directors of said corporation and a majority of the board of directors thereof, and without the knowledge or consent of plaintiff, to each of the following persons, to-wit: O. H. Avey, A. P. Scritchfield, M. F. Albert, J. W. Roberts, L. V. Patch, Otto C. Miller and R. E. Haynes, who at said time constituted

the board of directors of said corporation, said stock being issued as fully paid up; that the issuance of each 100 shares purported to be in consideration of a one-seventh equity in certain land consisting of about 240 acres, situate in Canyon County, Idaho; that said defendants nor either of them had any equity in said lands or any part thereof, except an option to purchase the same, which said option or interest was not of the value of said shares of stock so issued, to-wit: \$70,000 or any value at all to said corporation. That this plaintiff is reliably informed and verily believes and upon information and belief alleges the fact to be that there was no real or valuable consideration for the issuance of said 700 shares of stock in said defendant corporation, and that no part of the face or par value of said stock has ever been paid, of all of which said directors had knowledge. That between March 21, 1912, and September 21, 1915, and in violation of said by-laws above mentioned, 662 shares more of the capital stock in said defendant corporation of the par value of \$100.00 per share were issued by authority of said directors, then constituting a majority of said board, and without the knowledge or consent of plaintiff, to the persons above named in this paragraph who at said time constituted the board of directors of said corporation, as fully paid up, while in truth and in fact, and to the knowledge of said directors, said shares of stock were sold for 25 cents on each dol-

lar of the par valuation, and that there still remains unpaid upon said stock last above mentioned the sum of \$49,650.00 of which O. H. Avey owes \$8,700.00, he having purchased 116 of said shares at said price. That thereafter, there were issued to divers persons to plaintiff unknown, by authority of said directors and without the knowledge of consent of plaintiff, 28 shares of stock in said defendant corporation, of the par value of \$100.00 per share, the same being issued as fully paid up, while in truth and in fact and to the knowledge of said directors, said stock was sold at 25 cents on each dollar of valuation, and there still remains unpaid on said 28 shares, the sum of \$2,100.00. That there is due to said defendant corporation from said persons for stock issued, by reason of the facts above stated, the sum of \$121,750.

#### IX.

That on or about the month of March, A. D. 1914, said defendant corporation through a majority vote of its directors, said directors constituting such majority, borrowed the sum of \$5,000 from the Wallace National Bank of Wallace, Idaho, and thereafter one-half of said amount was loaned by said defendant corporation to certain of its directors without the knowledge or consent of this plaintiff. That said action was in direct violation of the laws of the State of Idaho in such cases made and provided.

## X.

That said defendant O. H. Avey and the other persons above named constituting the board of directors and the holders of a majority of the stock of said corporation, did on or about the..... day of December, 1917, as directors and stockholders, pass resolutions levying an assessment upon the stock held and owned by the plaintiff, amounting to the sum of \$900.00 for the alleged purpose of raising funds with which to pay debts of the corporation but upon protest of this plaintiff the said resolution was rescinded but plaintiff is informed and believes and therefore alleges that on account of the condition of the defendant company, further assessments will be made.

## XI.

That there is due the defendant corporation from the defendant, O. H. Avey, for said stock, the sum of \$18,700.00, that this plaintiff has made a demand on the other stockholders of this corporation and on its board of directors to institute an action to recover said sum of defendant, O. H. Avey, but inasmuch as all the officers, directors and stockholders of the company, except this plaintiff, are in the same position as defendant, O. H. Avey, said demand made upon them to have said Payette Land and Orchard Company prosecute an action to recover said sum, was disregarded and the making of any further demand would be a vain and useless thing.

That this suit is not a collusive one to confer jurisdiction on a court of the United States of which it would not otherwise have cognizance, but is brought in good faith to protect said corporation, enforce its rights and to protect its creditors.

WHEREFORE, Plaintiff prays:

That this Court enter a decree herein giving the defendant, Payette Valley Land and Orchard Company, judgment against defendant, O. H. Avey, for \$18,700.00.

That this Court award this plaintiff his costs and give such other and further relief as may seem meet and just in the premises.

JOHN H. NORRIS,

and

HAWLEY & HAWLEY,

*Solicitors for Plaintiff.*

Residence: Boise, Idaho.

STATE OF OREGON, )

) ss.

County of.....)

H. C. ANDERSON, being first duly sworn deposes and says, that he is the plaintiff herein; that he has read the above complaint and knows the contents thereof and believes the facts therein stated to be true and correct.

H. C. ANDERSON,

Subscribed and sworn to before  
me this 15th day of July, 1918.

H. S. McCUTCHAN,

*Notary Public for Oregon,*

Residence, Portland, Oregon.

My commission expires Nov. 16, 1919.

(SEAL)

2. That thereafter defendant filed with the clerk of the above entitled Court an answer in the following words omitting therefrom the title of court and cause which is identical with the title of court and cause in this bill of exceptions, to-wit:

'Come now the defendants herein and answering the complaint of the plaintiff admit, deny and allege as follows:

I.

Answering paragraph I of said complaint defendants admit that complainant is now a citizen and resident of the State of Oregon, but deny that said complainant was or has been at all the times mentioned in said complaint a citizen and resident of the State of Oregon.

II.

Answering paragraph II of said complaint, these defendants admit that complainant is now a stockholder in the defendant Payette Valley land and Orchard Company, Limited, but deny that said plaintiff was at the times and dates when the alleged acts complained of were alleged to have been committed, a stockholder or in any way interested in the Payette Valley Land and Orchard Company, Limited.

## III.

Defendants admit the allegations contained in paragraph III of said complaint.

## IV.

Defendants admit the allegations contained in paragraph IV of said complaint.

## V.

Defendants admit the allegations contained in paragraph V of said complaint.

## VI.

Defendants admit the allegations contained in paragraph VI of said complaint.

## VII.

Defendants admit the allegations contained in paragraph VII of said complaint, and in addition thereto allege that since January 17, 1913, said plaintiff has been a member of the Board of Directors of said corporation, and is still a member of said Board, and at all the times and dates of the alleged acts complained of by the plaintiff in his said complaint since January 17, 1913, said plaintiff was a duly elected, qualified and acting member of the Board of Directors of said corporation.

## VIII.

Defendants admit the allegations contained in the first six lines of paragraph VIII of said complaint. Further answering paragraph VIII of said complaint, defendants admit that on or about



the 21st day of February, 1910, but not in violation of any of the by-laws of said Payette Valley Land and Orchard Company, Limited, 100 shares of stock of said corporation of the par value of \$100.00 per share, were issued by order of the Board of Directors of said corporation, and without the knowledge or consent of the plaintiff, said plaintiff then not being a stockholder or interested in said corporation, to each of the following persons, to-wit: M. F. Albert, A. P. Scritchfield, O. H. Avey, J. W. Roberts, L. V. Patch, Otto C. Miller, and R. E. Haynes, who at said time constituted the Board of Directors of said corporation, said stock being issued as fully paid up. That the issuance of each of the 100 shares purported to be, and was, in consideration of a one-seventh interest in certain lands consisting of 720 acres, situated in what was at that time Canyon County, Idaho. Defendants admit and allege that the defendant Payette Valley Land and Orchard Company, Limited, had no equity or any interest in said land, or any part thereof, prior to the issuance of said stock aforesaid to the above named parties; but said defendants deny that said defendant O. H. Avey, had no equity in said land, or any part thereof, except an option to purchase the same, and deny that said A. P. Scritchfield, M. F. Albert, J. W. Roberts, L. V. Patch, Otto C. Miller and R. E. Haynes, or any or either of them, had any equity in said lands, or any part thereof, except an option to purchase

the same; and deny that the interest of the defendant O. H. Avey, in said land was not of the value of said shares of stock so issued, and deny that the interests of M. F. Albert, A. P. Scritchfield, J. W. Roberts, L. V. Patch, Otto C. Miller and R. E. Haynes, and the interest of each of said persons in said land, was not of the value of said shares of stock so issued; and deny that the stock so issued was of the value of \$70,000.00, and allege that said stock so issued had no actual or market value whatever, and that said corporation up to and until it purchased and took over the said land aforesaid and issued said stock therefor, had no property whatever, and further allege that the value of the interest of said parties aforesaid in the above described land at the time of the issuance of said stock was \$70,000.00, and was much greater than the value of the stock so issued. These defendants deny that there was no real or valuable consideration for the issuance of said 700 shares of stock of said defendant corporation, and deny that no part of the face or par value of said stock has ever been paid, and allege that said defendant, O. H. Avey, and each and all of said other parties aforesaid, paid a valuable consideration for said stock and more than the same was actually worth. These defendants admit that between March 21, 1912, and September 21, 1915, but deny that the same was in violation of any by-laws of said corporation, 662 shares more of the capital stock in said defendant

corporation of the par value of \$100.00 per share, were issued by authority of the Board of Directors of said corporation to the persons above named in said paragraph, but deny that it was without the knowledge or consent of the plaintiff, as fully paid up, for 25c on each dollar of the par valuation, and allege that said stock so issued was sold to the parties to whom the same was issued for the sum of \$25.00 per share, by order of the Board of Directors of said corporation, and deny that there still remains unpaid upon said stock last above mentioned the sum of \$49,650.00 or any other sum or amount whatever; and deny that said O. H. Avey owes on account of said sale the sum of \$8,700.00, or any sum or amount whatever. Defendants admit that said O. H. Avey purchased 116 of said shares at \$50.00 per share, and admit that 28 shares of the stock of said corporation have been sold to other parties for \$25.00 per share, by order of the Board of Directors, but deny that there still remains unpaid on said 28 shares the sum of \$2,100.00, or any sum or amount whatever, and deny that there is due the said corporation from said persons, or any or either of them, for the stock issued by reason of the facts above stated, or by reason of any other facts, the sum of \$121,750.00, or any sum or amount whatever.

#### IX.

Answering paragraph IX of said complaint, defendants admit said corporation borrowed the sum

of \$5,000.00 from the Wallace National Bank, of Wallace, Idaho, and that it thereafter paid said bank said borrowed money, and now owes said bank nothing. Said defendants deny that said money, or any part thereof, was loaned by said defendant corporation to certain of its directors, or to any person or persons whatsoever, but that the same was used in the business of said corporation.

### X.

Answering paragraph X, these defendants allege that in December, 1917, it was the opinion of a majority of the Board of Directors of said corporation that it would be for the best interests of said corporation to pay certain indebtedness of said corporation by an assessment on the stock rather than by a sale of the property belonging to said corporation, and therefore passed resolutions levying an assessment, but afterward, but not upon protest of the plaintiff or any other person, concluded not to enforce said assessment and rescinded said resolution. These defendants allege that they have no information or belief that on account of the condition of the defendant corporation further assessments will be made, sufficient to enable them to answer the allegations that further assessments will be made, and placing their denial on that ground, deny that on account of the condition of the defendant corporation further assessments will be made.

## XI.

Answering paragraph XI of said complaint, defendants deny that there is due the defendant corporation from the defendant, O. H. Avey or from any other person, for said stock, or any part thereof, the sum of \$18,700.00, or any other sum or amount whatsoever. These defendants allege that they have no information or belief as to the allegation that plaintiff has made a demand on the other stockholders of this corporation, and on its Board of Directors, to institute an action to recover the said sum of O. H. Avey, sufficient to enable them to answer such allegation, and placing their denial on that ground, deny that plaintiff has made a demand on the other stockholders of this corporation, and on its Board of Directors, to institute an action to recover said sum of O. H. Avey.

## XII.

Further answering said complaint, these defendants allege that on or about the first day of March, 1910, the defendant Payette Valley Land and Orchard Company, Limited, was organized under the laws of the State of Idaho by the defendant, O. H. Avey, together with M. F. Albert, A. P. Scritchfield, J. W. Roberts, L. V. Patch, Otto C. Miller and R. E. Haynes, for the purpose, among other things, of buying orchard land, growing orchards thereon, and disposing of said land after improvement. That the articles of incorporation

authorized the issuance of capital stock in the amount of 2,500 shares of the par value of \$100.00 per share; that on said first day of March, 1910, the said incorporators aforesaid were the owners of 720 acres of land of the value of \$70,000.00, in what is now Payette County, Idaho, formerly a part of Canyon County, Idaho, suitable for orchard purposes, and the said corporation aforesaid had no other land or property with which to begin business; that said incorporators each owned an undivided one-seventh interest in said orchard land aforesaid, and agreed among themselves that each would sell his interest in said land to said corporation for 100 shares of the capital stock of said corporation as fully paid up stock; that this defendant, O. H. Avey, together with said other parties aforesaid as the Board of Directors, and being the only persons owning any stock or interest in said corporation, and the only members in said corporation, for and on behalf of said corporation issued 100 shares of said capital stock as fully paid up to this defendant, O. H. Avey, and to each of said other incorporators aforesaid, and accepted in consideration therefor, and in full payment therefor, the said land aforesaid, and soon thereafter began to and did cultivate, improve and set out an orchard thereon, and the same was thereafter the property of said corporation until the same was sold by said corporation; that at the time of the sale of said stock as aforesaid the plain-

tiff was not a stockholder and had no interest in said corporation.

### XIII.

That no part of the capital stock of said defendant corporation was ever subscribed for by any person, but that all of the stock that has been issued and sold has been sold by the corporation to various persons as fully paid up stock; that none of said capital stock of said corporation has ever at any time been worth its par value, nor more than the sum of \$25.00 per share, nor has it ever at any time had a market value or been placed upon the market for sale.

### XVI.

That on the 13th day of February, 1912, for the purpose of providing funds for carrying on the business of said corporation, the Board of Directors by resolution duly authorized the sale of 560 shares of stock at \$25.00 per share; that at other times and dates while plaintiff was a member of the Board of Directors and present at its meetings, said Board of Directors authorized further sales of stock for the purpose of raising funds to carry on the business, at \$25.00 per share; that of said stock so authorized to be sold as aforesaid, the Board of Directors of said corporation sold to this defendant, O. H. Avey, 116 shares of said capital stock for the sum of \$25.00 per share, at the following named dates, to-wit:

|                        |           |
|------------------------|-----------|
| March 8, 1912.....     | 80 shares |
| October 19, 1912.....  | 20 shares |
| December 30, 1914..... | 4 shares  |
| March 4, 1915.....     | 4 shares  |
| August 20, 1915 .....  | 8 shares  |

That said stock so sold was issued to said O. H. Avey as fully paid up stock, said \$25.00 per share being the full value of said stock at said time; that this defendant O. H. Avey has paid the purchase price of said stock to said corporation for same and now owes nothing therefor; that said corporation has been obliged to sell stock of said corporation from time to time, by order of the Board of Directors, to provide funds for carrying on the business, and has never at any time been able to sell said stock for more than the sum of \$25.00 per share in cash, and has issued all stock as fully paid up for sales so made.

#### XV.

That on the 10th day of May, 1912, the plaintiff became the owner of 100 shares of stock in said corporation, and from said date up to the present time has at all times been familiar and fully acquainted with the business transactions of said corporation and its Board of Directors, a portion of said time having the management of its orchard tract and property; that prior to said date said plaintiff was not a member or stockholder of said corporation and was not interested therein.



XVI.

That on or about the 17th day of January, 1913, said plaintiff became one of the directors of said corporation, and at all times since said last mentioned date has been, and now is, one of the directors of said corporation and familiar with all of its business transactions, and has at all times assented to and has never at any time objected to the transactions mentioned in said complaint; that said plaintiff is guilty of laches and is now estopped from bringing this action on his alleged claims.

XVII.

That each and all of the alleged transactions complained of by plaintiff have each and all been ratified and approved by plaintiff and by said corporation.

XVIII.

That each and all of the alleged transactions complained of occurred and any action thereon accrued more than four years prior to the commencement of this action, and are barred by Section 4053, Section 4054 and Section 4060 of the Idaho Revised Code.

WHEREFORE, Defendants pray that plaintiff take nothing by this action; that said action be dismissed, and that defendants recover their costs and disbursements herein incurred.

F. H. LYONS,

And

R. E. HAYNES,

Residing at Payette, Idaho,

THOMPSON &amp; BICKNELL,

Residing at Caldwell, Idaho,

*"Solicitors for Defendants."*

STATE OF IDAHO, )

) ss.

County of Payette. )

O. H. AVEY, being first duly sworn, deposes and says: That he is one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof, and that he believes the facts therein stated to be true.

O. H. AVEY.

Subscribed and sworn to before me  
this 12th day of August, 1918.

ROBT. E. HAYNES,

*Notary Public for Idaho.*

Residing at Payette.

(SEAL)

3. That thereafter, by leave of the Court, the plaintiff amended his said complaint in the following words, omitting the title of court and cause therefrom, which title of court and cause is identical with title of court and cause in this Bill of Exceptions, to-wit

“COMES NOW, the plaintiff herein and leave of the Court being first had and obtained and files an amendment to the complaint on file herein by inserting after paragraph X of said complaint and as paragraph X (a) and X (b) thereof the following:

X (a)

That the above named directors of the Payette Valley Land and Orchard Company, Limited, a corporation, have refused to make a call upon the above named defendant for the amount unpaid upon the said stock purchased by the said defendant and said directors still now refuse to make said call. That this action is brought by this plaintiff in the name of and for the benefit of the corporation to require and compel the defendant above named to pay the amount due upon his purchase of said stock. That between the 1st day of January, 1915, and the filing of this complaint the said defendant Payette Valley Land and Orchard Company, Limited, a corporation, became indebted to various parties in a large sum of money, the exact amount being unknown to this plaintiff, but upon information and belief the plaintiff alleges the fact to be that the said corporation is now, and has been for the four years last past, indebted to various creditors in the sum of \$60,000.00 in excess of its assets, and that said corporation has no funds with which to pay its creditors. That it is necessary for said corporation to collect the amounts unpaid upon the stock purchased by the said defendant herein as heretofore alleged in order for said corporation to pay its creditors. That if said corporation collects the amounts due from the defendant and other stockholders, as hereinbefore alleged, it will have sufficient

funds to pay its creditors and continue operating as a going concern and unless its said sums are collected it will become insolvent and unable to pay its creditors.

X (b)

That the plaintiff herein has agreed to pay his attorneys a reasonable fee for the prosecution of this action; that \$1000.00 is a reasonable fee for said prosecution which sum plaintiff has agreed to pay his attorneys in this suit; that by reason of his prosecution of this action plaintiff is entitled to said sum as attorney's fees.

That the prayer of said complaint be amended by adding the following paragraph:

That the Court award the plaintiff the sum of \$1000.00 as attorney's fees.

HAWLEY & HAWLEY,  
Residence: Boise, Idaho.  
*Attorneys for Plaintiff.*

STATE OF IDAHO,) )  
County of Ada. ) ss.

H. C. ANDERSON, being first duly sworn, deposes and says that he is the plaintiff in the above entitled action; that he has read the above and foregoing amendment to said complaint and knows the contents thereof, and believes the facts therein stated to be true and correct.

H. C. ANDERSON,

Subscribed and sworn to before me this 28th day of October, 1920.

CHAS. W. MACK,  
*Notary Public for Idaho.*  
Residence: Boise, Idaho.

(SEAL)

4. That thereafter and on the 28th day of October, 1920, the said cause came on for trial before the Honorable Frank S. Dietrich, Judge of the above entitled Court, the plaintiff appearing by Messrs. Hawley & Hawley, and defendants appearing by Messrs. Richards & Haga and Thompson & Bicknell. Whereupon, the following proceedings were had, to-wit:

Upon agreement of counsel, it was ordered that this cause be consolidated for the purposes of trial with the case of H. C. Anderson, plaintiff, vs. M. F. Albert and Payette Valley Land & Orchard Company, Limited, a corporation, defendants. Thereupon, plaintiff called as a witness in their behalf C. E. Larsen, who was thereupon sworn to testify in said cause. Whereupon counsel for defendants objected to the introduction of any testimony by the plaintiff on the grounds that the complaint does not state a cause of action. Whereupon, argument was heard and the Court took said matter under advisement and having considered the same, announced his decision sustaining the objection to the introduction of evidence on the part of plaintiff to which ruling plaintiff claimed an exception which said exception was thereupon allowed. Whereupon, defendants moved the Court to dismiss said cause upon the grounds stated in said objection to the introduction of testimony which said motion the Court granted without costs to either party, to which ruling of the Court plain-

tiff duly excepted and which exception was thereupon allowed by the Court.

5. That thereafter and on the 1st day of November, 1920, a decree dismissing said cause was signed and entered in said cause in the following words, to-wit:

“This cause coming on regularly for trial before the Court this 28th day of October, 1920, Messrs. Hawley & Hawley appearing for plaintiff and Messrs. Richards & Haga and Thompson & Bicknell appearing for defendants, and the Court having permitted said plaintiff to introduce testimony under a reserved ruling on defendants’ objection to the introduction of such testimony thereafter sustaining such objection and also defendants’ motion to dismiss the above entitled action and the Court being fully advised in the premises, it is hereby Ordered, Adjudged and Decreed that the above entitled action be, and the same is hereby, dismissed, the parties hereto paying their respective costs.

Dated this 1st day of November, 1920.

FRANK S. DIETRICH,  
*District Judge.*”

WHEREFORE, Plaintiff prays that this his bill of exceptions, be allowed, settled and signed.

JOHN H. NORRIS,  
HAWLEY & HAWLEY,  
*Solicitors for Plaintiff.*  
Residence: Boise, Idaho.

Service by copy of the foregoing bill of exceptions of plaintiff is acknowledged this 30th day of November, 1920, and it is agreed that the same is correct, complete and accurate and was in due time presented and agreed upon by the parties hereto as a full and complete bill of exceptions, and the issuance and service of citation on appeal is hereby waived.

RICHARDS & HAGA,  
Residing at Boise, Idaho,  
THOMPSON & BICKNELL,  
Residence at Caldwell, Idaho.  
*Solicitors for Defendant.*

The foregoing bill of exceptions is hereby settled and allowed.

FRANK S. DIETRICH,  
*District Judge.*

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STIPULATION FOR STATEMENT AND  
CONTENTS OF RECORD ON APPEAL.

IT IS STIPULATED AND AGREED, by and between the respective parties in said cause, through their solicitors, that the foregoing Bill of Exceptions shall constitute a prepared statement of the case in accord with United States General Equity Court Rule Number 77, and the same may be filed in the office of the Clerk of said District Court superseding, for the purposes of the appeal in said cause all part of the record other than the

decree in said cause. It is further stipulated that the following papers and documents constitute all the portion of the records in said cause which are necessary, material or pertinent to the presentation and decision of all questions and matters arising on the appeal in said cause taken by complainant to the United States Circuit Court of Appeals, for the Ninth Circuit sitting at San Francisco, California, and that the following described parts of said record and no more, shall constitute the entire records to be transcribed, certified and included in the record to be transmitted to said Circuit Court of Appeals, on said above described appeal, to-wit:

Bill of Exceptions and Statement, including this Stipulation.

Decree.

Petition for Appeal and Order allowing Appeal.

Bond showing approval of the Judge.

Assignment of Errors.

Citation.

Praecipe to the Clerk for record, Certificate and Return.

Endorsements of service, Acceptance of service and filing, settlement or approval appearing on any of the above.

JOHN H. NORRIS,

HAWLEY & HAWLEY,

*Solicitors for Complainant and Appellant.*



RICHARDS & HAGA,  
THOMPSON & BICKNELL,  
*Solicitors for Defendants and Respondents.*

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APPROVAL OF STATEMENT.

The preparation of the foregoing statement on appeal is hereby approved.

FRANK S. DIETRICH,  
*Judge of the United States  
District Court for Idaho.*

Endorsed: Filed Dec. 8, 1920.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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DECREE OF DISMISSAL.

This cause coming on regularly for trial before the Court this 28th day of October, 1920, Messrs. Hawley & Hawley appearing for plaintiff and Messrs. Richards & Haga and Thompson & Bicknell appearing for defendants, and the Court, having permitted said plaintiff to introduce testimony under a reserved ruling on defendant's objection to the introduction of such testimony, thereafter sustaining such objection and also defendants' motion to dismiss the above entitled action, and the Court being fully advised in the premises, it is hereby ORDERED, ADJUDGED and DECREED, That the above entitled cause be, and the same is

hereby dismissed, the parties hereto paying their respective costs.

Dated this 1st day of November, 1920.

FRANK S. DIETRICH,

*District Judge.*

Endorsed, Filed Nov. 1, 1920.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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PETITION FOR APPEAL.

TO THE HONORABLE FRANK S. DIETRICH,  
DISTRICT JUDGE:

The above named plaintiff in the above entitled cause, to-wit: H. C. Anderson, conceiving himself aggrieved by the orders made and entered in the above entitled cause under date of October 28, 1920, and the decree made and entered by said court therein under date of November 1, 1920, wherein and whereby it was ordered that the objection of defendants to the introduction of any testimony by plaintiff be sustained and that said cause be dismissed and it was decreed that said cause be dismissed, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said orders and decree for the reasons set forth in Assignment of Errors which is filed herewith; and he prays that this petition for his said appeal may be allowed, and that a transcript of the records, proceedings and papers upon which

said order and decrees were made duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, and that citation issue as provided by law.

And your petitioner further prays that the proper order setting the security to be required of him to perfect his appeal be made.

Dated this 7th day of December, 1920.

JOHN H. NORRIS,

HAWLEY & HAWLEY,

*Solicitors for Plaintiff.*

Residing at Boise, Idaho.

ORDER.

The foregoing petition on appeal is granted and the claim of appeal therein made is allowed.

The appellant shall give bond as required by law in the sum of \$100.00.

Done in open court this 8th day of December, 1920.

FRANK S. DIETRICH,

*District Judge.*

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(Title of Court and Cause.)

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ASSIGNMENT OF ERROR.

COMES NOW the complainant and files the fol-

lowing assignment of errors upon which he will rely upon his appeal from the decree made by this Court on the 1st day of November, 1920, in the above entitled cause:

1. That the said Court erred in sustaining defendants' objection to the introduction of any testimony on the part of plaintiff.

2. That the said Court erred in making an order dismissing said cause.

3. That the said Court erred in entering a decree dismissing said cause.

4. That the said District Court erred in not permitting the introduction of evidence on the part of the plaintiff.

5. That the said District Court erred in not hearing said cause upon the merits.

WHEREFORE, The said H. C. Anderson, appellant, prays that the decree of the District Court of the United States for the District of Idaho, Southern Division, be reversed and that the said District Court be directed to proceed with the taking of evidence in said cause and the hearing thereof upon its merits.

JOHN H. NORRIS,  
HAWLEY & HAWLEY,  
*Solicitors for Appellant.*  
Residence: Boise, Idaho.

Service of the foregoing Petition for Appeal and Assignment of Error acknowledged this 7th day of December, 1920.

RICHARDS & HAGA,  
THOMPSON & BICKNELL,

*Solicitors for Respondent.*

Endorsed, Filed Dec. 7, 1920,

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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BOND.

WHEREAS, the Plaintiff in the above entitled action is about to appeal to the United States Circuit Court of Appeals, from a judgment rendered against him in the United States District Court for the District of Idaho, Southern Division, and in favor of the Defendant, and entered upon the first day of November, 1920.

NOW, THEREFORE, in consideration of the premises, and of such appeal, the NATIONAL SURETY COMPANY, a New York Corporation, hereby undertakes and promises on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against the said Appellant on the said appeal or on a dismissal thereof, not exceeding the sum of ONE HUNDRED AND NO/100 (\$100.00) DOLLARS, to which amount it acknowledges itself bound.

IN WITNESS WHEREOF, the said NATIONAL SURETY COMPANY has caused this undertaking to be executed by its Attorney-in-Fact, at Boise, Idaho, this eighth day of December, 1920.

NATIONAL SURETY COMPANY,

By L. W. Ensign,  
*Its Attorney-in-Fact.*

(National Surety Co. Seal.)

The foregoing Undertaking on appeal is approved this 9th day of December, 1920.

FRANK S. DIETRICH,  
*United States District Judge for Idaho.*

Endorsed, Filed Dec. 9, 1920,  
W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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CITATION.

UNITED STATES OF AMERICA TO:

O. H. AVEY, and PAYETTE VALLEY LAND AND ORCHARD COMPANY, LIMITED, a corporation,

GREETINGS: You are hereby notified that in

a certain case in equity in the United States District Court in and for the District of Idaho, Southern Division, wherein H. C. Anderson is complainant and O. H. Avey and Payette Valley Land and Orchard Company, Limited, a corporation, are defendants, an appeal has been allowed the complainant therein to the United States Circuit Court of Appeals, sitting at San Francisco, California. You are hereby cited and admonished to be and appear in said Court at San Francisco, California, thirty days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS The Honorable Frank S. Dietrich, Judge of the United States District Court for the District of Idaho, Southern Division, this the 9th day of December, A. D., 1920.

FRANK S. DIETRICH,

*United States District Judge for  
the District of Idaho, Southern  
Division.*

ACCEPTANCE OF SERVICE.

Service of the foregoing Citation is acknowledged and accepted this 9th day of December, 1920.

THOMPSON & BICKNELL,  
RICHARDS & HAGA,

*Solicitors for Defendants and Appellees.*

Endorsed, Filed Dec. 9, 1920.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PRAECIPE TO THE CLERK FOR TRAN-  
SCRIPT ON APPEAL.  
TO THE CLERK OF THE ABOVE ENTITLED  
COURT:

The complainant above named having on the 8th day of December, A. D. 1920, taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, from said certain decree made and entered in said cause in the above entitled Court on the 1st day of November, 1920, you will please prepare, certify, print, return and transmit to said Circuit Court of Appeals transcript of the record in said cause in accordance with the Act of Congress approved February 13, 1911, entitled "An Act to Diminish Expense of Proceedings on Appeal and Writ of Error or of Certiorari and rules of Court adopted thereunder, including therein the following portions of the record in said cause in accordance with the stipulation of all parties to said action and the said appeal filed herewith, to-wit:

Bill of Exceptions and statement including stipulation attached thereto.

Decree.

Petition for appeal and order allowing appeal.

Bond.

Assignment of Error.

Citation.



Copy of this Praecepte.

Certificate and Return.

Endorsements of Service, Acceptance of Service, Filing, settlement or approval appearing on any of the above.

JOHN H. NORRIS,  
HAWLEY & HAWLEY,

*Solicitors for Complainant and Appellant.*

Service of the within and foregoing praecipe by receipt of copy thereof this 9th day of December, 1920, is hereby acknowledged.

RICHARDS & HAGA,  
THOMPSON & BICKNELL,

*Solicitors for Defendants and Respondents.*

Endorsed, Filed Dec. 9, 1920.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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#### CLERK'S CERTIFICATE.

I. W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 42, inclusive, to be full, true and correct copies of Bill of Exceptions and statement including stipulation attached thereto, Decree, Petition for Appeal and order allowing appeal, Bond, Assignment of Error, Citation, Praecepte and Clerk's Certificate, in the above entitled cause, and that the same together constitute the

transcript upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe for such transcript.

I further certify that the cost of the record herein amounts to the sum of \$49.40, and that the same has been paid by the Appellant.

Witness my hand and the seal of said Court this 22th day of December, 1920.

W. D. McREYNOLDS,

(SEAL)

*Clerk.*